APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STEVEN D. COMPTON,

Plaintiff-Appellee,

v.

SUBARU OF AMERICA, INC.; FUJI HEAVY INDUSTRIES, INC.,

Defendants-Appellants.

[FILED Apr. 30, 1996]

No. 94-3429

PRODUCT LIABILITY ADVISORY COUNCIL, INC.,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 90-CV-1088)

Richard C. Hite (Scott J. Gunderson with him on the briefs), Kahrs, Nelson, Fanning, Hite & Kellogg, Wichita, Kansas, for Defendants-Appellants.

Lynn R. Johnson (Stephen N. Six and Patrick A. Hamilton with him on the brief), Shamberg, Johnson & Bergman, Chtd., Overland Park, Kansas, for Plaintiff-Appellee.

Marc R. Brosseau and Scott D. Peterson, Weller Friedrich, LLC, Denver, Colorado, and Hugh F. Young, Jr., Product Liability Advisory Council, Inc., Reston, Virginia, for Amicus Curiae.

Before PORFILIO, McWILLIAMS, and ALARCON,* Circuit Judges.

JOHN C. PORFILIO, Circuit Judge.

Steven D. Compton brought this products liability action after sustaining severe injuries in an automobile rollover accident. Mr. Compton sued the automobile manufacturer, Fuji Heavy Industries, Ltd. (Fuji), and the distributor, Subaru of America, Inc. (Subaru), alleging the accident vehicle was defectively designed. After a jury trial, Subaru and Fuji were found 56% at fault for Mr. Compton's injuries, and judgment was entered against them in the amount of $6,574,081.

On appeal, Subaru and Fuji raise two issues. First, they contend the district court erroneously admitted the testimony of Mr. Compton's design expert and thus failed to carry out its gatekeeping function as required under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[1] Second, Subaru and Fuji argue the district court improperly denied their renewed motion for judgment as a matter of law. We affirm.

I.

On the evening of February 19, 1988, Mr. Compton and four other teenaged friends consumed several six-packs of beer and drove around Scott County, Kansas, in a 1982 Subaru GL Station Wagon. While traveling on U.S. Highway 83, the teenagers spotted the automobile of Mr. Compton's ex-girlfriend. Tailing behind, the Subaru weaved back and forth across the yellow line until one of the teenagers reached over and yanked on the steering wheel, causing the driver to lose control. The Subaru skidded

---

* The Honorable Arthur L. Alarcon, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

[1] The Product Liability Advisory Council, Inc., filed an amicus brief in support of Subaru and Fuji urging us to apply *Daubert* to all expert testimony. However, as discussed below, we expressly decline to reach this issue.

across the highway, entered a ditch, and rolled over twice. During its first roll, Mr. Compton, seated in the rear seat behind the driver and not wearing a seatbelt, suffered a spinal cord injury resulting in quadriplegia.

Mr. Compton filed this action against Subaru and Fuji in February 1990. In his complaint, Mr. Compton alleged the accident vehicle was defectively designed because there was "excessive and extensive intrusion of the roof and side of the automobile into the passenger compartment during the rollover." According to Mr. Compton, he would have avoided serious injury during the rollover if the roof had not "collapsed inward" onto his head. Therefore, Mr. Compton asserted Subaru and Fuji were strictly liable for his injuries.

During trial, Subaru and Fuji objected to the proposed testimony of Mr. Compton's sole design expert, Larry Bihlmeyer, because they contended Mr. Bihlmeyer's background and experience did not qualify him as an expert on the design of automobile roofs or roof support structures. Furthermore, Subaru and Fuji urged Mr. Bihlmeyer failed to meet the requirements for expert testimony set out in *Daubert*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. After a Rule 104(a) hearing conducted outside the presence of the jury, however, the district court ultimately concluded Mr. Bihlmeyer was sufficiently qualified and allowed him to testify.

Having survived the district court's initial scrutiny of his qualifications, Mr. Bihlmeyer, an aerospace and mechanical engineer, testified the design and roof support structures in the accident vehicle were defective because they permitted excessive roof crush. He then pinpointed areas of the roof structure where, in his expert opinion, additional support was required. To correct the alleged defects, Mr. Bihlmeyer testified he would design the vehicle to allow only 2 to 3 inches of roof crush. He also explained crush should be limited to ensure 33 inches of remaining headroom after an accident occurring at a speed of 50 m.p.h. Under this standard, the roof of the vehicle would be required to sustain average forces of between 48,000 and 71,000 pounds, which the district court remarked "seems more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive."

In arriving at his conclusion that the accident vehicle was defectively designed, Mr. Bihlmeyer relied upon his inspection of the accident vehicle and an identical, undamaged 1982 GL Subaru Station Wagon. Next, Mr. Bihlmeyer established his proposed roof crush and headroom requirements by comparing the headroom measurements in the accident vehicle with measurements compiled from hundreds of other accident vehicles he had examined during his eight-year career as a "consulting engineer." Mr. Bihlmeyer also used six other sources to support his proposed requirements: (1) a summary of a 1972 proposed, but not adopted, Ford Motor Company (Ford) standard which would have required a remaining headroom of 29.4 inches after roof crush on unnamed vehicles; (2) technical papers containing information about a Ford experimental safety vehicle which was not a production vehicle; (3) a 1966 proposed, but not adopted, federal standard for light utility vehicles with open bodies which would have required roll bars and a minimum of 33 inches remaining headroom after roof crush; (4) a Society of Automotive Engineers (SAE) paper presented by an engineer at Fiat, discussing the advantages of roof crush as an energy-absorbing device for seat-belted occupants; (5) Federal Motor Vehicle Safety Standard 216, which sets no requirements for remaining headroom after roof crush; and, (6) an SAE paper entitled "Field Studies of Rollover Performance," which studied rollover accidents involving British cars and light vans, but did not propose any headroom requirements.

At the close of Mr. Compton's case, and again at the close of all the evidence, Subaru and Fuji moved for judgment pursuant to Fed.R.Civ.P. 50(a), arguing Mr. Bihlmeyer's testimony was so ludicrous no reasonable juror could conclude his testimony was more likely than not true. In both instances, the district court denied the motions after carefully examining Mr. Bihlmeyer's testimony. Subsequently, the jury returned a verdict finding Subaru and Fuji 56% at fault for Mr. Compton's injuries. After the verdict, Subaru and Fuji renewed their Rule 50 motion, which the district court denied. Subaru and Fuji now appeal.

II.

Upon Subaru's and Fuji's motion, the district court heard argument regarding the admissibility of Mr. Bihlmeyer's testimony. Although expressing doubts about his credibility, the court

ultimately determined Mr. Bihlmeyer met the qualifications for expert testimony under Federal Rule of Evidence 702. The district court addressed *Daubert's* applicability and explained:

> I don't think the *Daubert* case has a lot to do with the problem that I'm faced with.... I don't think we're dealing with [a *Daubert* situation] here. Really. But to the extent that you might say that we are, clearly there's some scientific knowledge involved in the testimony of Mr. Bihlmeyer and it seems to me that ... his testimony ... is being offered and will assist the jurors to understand whether or not there is a design or manufacturing defect involved in this case. So to the extent the *Daubert* case is applicable, it's applicable.

Thus, the district court relied, in part, on *Daubert* in reaching its conclusion Mr. Bihlmeyer was qualified as an expert.

Subaru and Fuji now contend the district court erred in admitting Mr. Bihlmeyer's testimony. Under *Daubert's* test for the admissibility of scientific evidence, Subaru and Fuji argue Mr. Bihlmeyer's testimony should have been excluded because it lacked evidentiary reliability and was not grounded in any particular reasoning or methodology. They contend Mr. Bihlmeyer's testimony was nothing more than his personal opinion the roof of the accident vehicle was not sufficiently resistant to crush. Indeed, Subaru and Fuji assert Mr. Bihlmeyer did not rely on industry data and did not refer to any scientific principles or knowledge supporting his personal standard for roof crush resistance. Accordingly, because there was no peer review, no testing, and no evidence of general acceptance of Mr. Bihlmeyer's theory, Subaru and Fuji argue Mr. Bihlmeyer's testimony should have been excluded under *Daubert*.

In response, Mr. Compton contends *Daubert* is inapplicable to Mr. Bihlmeyer's nonscientific testimony. Mr. Compton asserts Mr. Bihlmeyer reached his conclusions based upon his own expertise and experience, not the methods and procedures of science. Therefore, Mr. Compton argues the district court correctly stated "[f]actors such as rate of error, peer review and acceptance in a 'relevant scientific discipline' have little, if any, bearing on mundane, 'professional witness' engineering testimony such as [Mr.] Bihlmeyer's." *Daubert* aside, Mr. Compton

contends the district court did not err in admitting Mr. Bihlmeyer's testimony.

The applicability of *Daubert* is a question of law which this court reviews **de novo**. *See, e.g., Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994) ("we undertake a de novo review of whether the district court properly followed the framework set forth in *Daubert*"). However, once we determine *Daubert's* relevance and application, our review of the district court's decision to admit expert testimony is limited. We may reverse the district court only for abuse of discretion. *United States v. Barbee*, 968 F.2d 1026, 1031 (10th Cir. 1992).

We begin our analysis with a discussion of *Daubert's* impact on the law governing the admissibility of expert opinion testimony in a federal trial. Rule 702, which regulates the admission of expert testimony, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

Prior to *Daubert*, we recognized, under the Federal Rules, trial courts "are accorded broad discretion in determining the competency of expert witnesses." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100 (10th Cir. 1991). Our cases further noted, however, the trial court "may not employ [this] discretion to restrict viable and relevant theories offered by a party." *Graham v. Wyeth Labs.*, 906 F.2d 1399, 1409 (10th Cir.), *cert. denied*, 498 U.S. 981, 111 S.Ct. 511, 112 L.Ed.2d 523 (1990). Instead, mindful of the "'liberal thrust' of the Federal Rules," *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988), we have instructed, "the 'touchstone' of admissibility [under Rule 702] is helpfulness to the trier of fact." *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 648 (10th Cir. 1991). Therefore, "as long as a logical basis exists for an expert's opinion ... the weaknesses in the underpinnings of the opinion[ ] go to the weight and not the admissibility of the testimony." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir.1988); *see also*,

Orth v. Emerson Elec. Co., White-Rodgers Div., 980 F.2d 632, 637 (10th Cir. 1992).

The Supreme Court's decision in *Daubert* now mandates a further Rule 702 inquiry under certain circumstances. In *Daubert*, the Court considered the admissibility of novel scientific evidence. There, petitioners brought suit against Merrell Dow for birth defects allegedly caused by ingestion of the drug Bendectin during pregnancy. *Daubert*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. Petitioners sought to introduce the testimony of several experts who relied upon animal rather than epidemiological (human statistical) studies in reaching their conclusion that Bendectin caused birth defects. Because petitioners' experts did not base their testimony on epidemiological evidence, the district court held the expert testimony failed to meet the "general acceptance" test as set out in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), 727 F.Supp. 570, 575 (S.D. Cal.1989). On appeal, the Ninth Circuit affirmed. 951 F.2d 1128 (1991).

After granting certiorari, the Supreme Court reversed. Rejecting the *Frye* test, the Court set out a new framework for determining the admissibility of expert scientific testimony:

> [T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93, 113 S.Ct. at 2796. The Court then outlined a nonexhaustive list of factors courts should consider when reviewing a proffer of expert scientific testimony. These include whether the theory or technique has been tested, subjected to peer review or publication, is generally accepted within the relevant scientific community, or has a known or potential rate of error. *Id.* at 591-95, 113 S.Ct. at 2796-97. In considering these factors, the Court reminded, "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 113 S.Ct. at 2797.

The language in *Daubert* makes clear the factors outlined by the Court are applicable only when a proffered expert relies on some principle or methodology. In other words, application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training. *See, e.g., United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995) (citing *Daubert* but applying a traditional Rule 702 analysis to tax attorney's expert testimony which was based upon his personal experiences). In such cases, Rule 702 merely requires the trial court to make a preliminary finding that proffered expert testimony is both relevant and reliable while taking into account "[t]he inquiry envisioned by Rule 702 is ... a flexible one." *Daubert*, 509 U.S. at 589-95, 113 S.Ct. at 2795-97.

Subsequent to *Daubert*, we have continued to apply essentially the same Rule 702 analysis except in cases involving unique, untested, or controversial methodologies or techniques. In *United States v. Markum*, 4 F.3d 891 (10th Cir. 1993), for example, we cited *Daubert's* analysis of Rule 702 in upholding the district court's decision to permit a fire chief's testimony based upon personal observations and the observations of fellow fire-fighters. There, because no methodology or technique was implicated, we applied a traditional Rule 702 analysis. *Id.* at 895-96. Similarly, in *United States v. Muldrow*, 19 F.3d 1332, 1338 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 175, 130 L.Ed.2d 110 (1994), we again resorted to the conventional Rule 702 approach, permitting expert testimony by a police officer with specialized knowledge of drug trafficking. However, in *Muldrow*, we also applied the *Daubert* factors to the expert testimony of a forensic chemist to determine the reliability and relevance of his methodology. *Id.* at 1337.

In sum, we do not believe *Daubert* completely changes our traditional analysis under Rule 702. Instead, *Daubert* sets out additional factors the trial court should consider under Rule 702 if an expert witness offers testimony based upon a particular methodology or technique.

With this background in mind, we turn to the specific facts before us. We conclude, for reasons other than those urged by Mr. Compton, the district court erred in its application of *Daubert* in

this case.[2] Mr. Compton characterizes Mr. Bihlmeyer's testimony as nonscientific evidence and argues *Daubert* is inapplicable to such evidence. However, it is unnecessary to reach the question whether *Daubert* mandates a further inquiry into Mr. Bihlmeyer's "scientific, technical, or other specialized knowledge" under Rule 702 because we find his testimony was not based on any particular methodology or technique. Rather, Mr. Bihlmeyer reached his expert conclusions by drawing upon general engineering principles and his twenty-two years of experience as an automotive engineer. Absent some particular methodology or technique, *Daubert* simply has little bearing on Mr. Bihlmeyer's testimony.

Although the district court erred in applying *Daubert*, we nevertheless affirm the court's decision to permit Mr. Bihlmeyer's testimony because we are convinced the court fulfilled its responsibility under Rule 702.[3] The district court, after carefully reviewing Mr. Bihlmeyer's testimony, reluctantly concluded his testimony was "facially helpful and relevant." Moreover, citing *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100 (10th Cir. 1991), the court found Mr. Bihlmeyer "possessed the basic qualifications to give such testimony."

Subaru and Fuji argue Mr. Bihlmeyer was not qualified to give expert testimony under Rule 702 because he lacked experience designing car roofs or supporting structures. We disagree. The record reveals Mr. Bihlmeyer is an aerospace and mechanical engineer with twenty-two years of experience in automotive engineering. During his fourteen years at Ford, Mr. Bihlmeyer

---

[2] "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446, 113 S.Ct. 2173, 2178, 124 L.Ed. 402 (1993) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 1718, 114 L.Ed. 152 (1991)).

[3] "We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (quotations omitted).

spent nine years in the vehicle components engineering division and five years in vehicle engineering where he was involved in the development of the Ranger Supercab pick-up truck roof design. Although Mr. Bihlmeyer never conducted or observed rollover tests or static tests for roof crush while at Ford, in the eight years since leaving Ford to become a "consulting engineer," Mr. Bihlmeyer has performed numerous design analyses on the roof and roof support structures of various vehicles.

As long as an expert stays "within the reasonable confines of his subject area," our case law establishes "a lack of specialization does not affect the admissibility of [the expert] opinion, but only its weight." *Wheeler*, 935 F.2d at 1100 (mechanical engineer with expertise in the design of farm equipment permitted to testify on consumer expectations despite lack of experience in consumer sampling); *see also*, *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 176-77 (5th Cir. 1990) (engineer experienced in designing devices similar to a brake press qualified to testify on safety of brake press), *cert. denied*, ___ U.S. ___, 114 S.Ct. 171, 126 L.Ed.2d 131 (1993). In this case, Mr. Bihlmeyer based his testimony upon general engineering principles and concepts. Although another witness might certainly have provided greater expertise in the area of roof design and support structures, nevertheless, we think Mr. Bihlmeyer's education and experience as an automotive engineer were sufficient to permit his testimony. Thus, we hold the district court did not abuse its discretion.

III.

Next, Subaru and Fuji argue the district court erred in denying their renewed motion for judgment as a matter of law made pursuant to Fed.R.Civ.P. 50(b). We review the district court's denial of a Rule 50(b) motion **de novo**, *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 74, 133 L.Ed.2d 34 (1995), applying the same standard used by the district court. *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 723 (10th Cir. 1993). "Under this standard, we may find error only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party for whom the jury found; we must construe the evidence and inferences most favorably to the nonmoving party." *Zimmerman v. First Fed. Sav.*

& Loan Ass'n of Rapid City, 848 F.2d 1047, 1051 (10th Cir. 1988).

Subaru and Fuji argue, first, the district court was "dutybound" to grant the Rule 50(b) motion in light of the court's serious reservations about the testimony of Mr. Compton's sole design expert, Mr. Bihlmeyer. We disagree. In its Memorandum and Order denying the Rule 50(b) motion, the district court commented, "[r]ereading Bihlmeyer's testimony has done nothing to change the court's extremely low opinion of Bihlmeyer's credibility and of the validity of his opinions." The court then correctly noted the weight and credibility of Mr. Bihlmeyer's testimony were issues for the jury, and concluded his testimony met the requirements under Rule 702. This finding was critical to the court's acceptance of Mr. Bihlmeyer's testimony. Having made its Rule 702 determination, the district court did not err in allowing Mr. Bihlmeyer's testimony despite the court's opinion of his testimony.

Second, Subaru and Fuji contend Mr. Bihlmeyer's testimony is insufficient under Kansas law because it amounted to a conclusory allegation the roof of the Subaru was too weak. To prove defective design under Kansas law, a plaintiff must do more than merely assert a different design was feasible. *Garst v. General Motors Corp.*, 207 Kan. 2, 20, 484 P.2d 47, 61 (1971); *see also*, *Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933, 947 (D. Kan. 1994), *aff'd*, 70 F.3d 1175 (10th Cir. 1995). However, after reviewing the record, we conclude Mr. Bihlmeyer identified at least six specific design defects and adequately supported his conclusions.

Finally, Subaru and Fuji assert Mr. Bihlmeyer's testimony was insufficient to rebut the presumption of nondefectiveness under the Kansas Product Liability Act (KPLA). Under KPLA:

> When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective by reason of design or performance,...unless the claimant proves by a preponderance of the evidence that a

> reasonably prudent product seller could and would have taken additional precautions.

Kan. Stat. Ann. § 60-3304(a). Subaru and Fuji argue their Rule 50(b) motion should have been granted because Mr. Compton provided no evidence the alleged regulatory standard, Federal Motor Vehicle Safety Standard (FMVSS) 216, 49 C.F.R. § 571.216, was inadequate or that additional precautions were necessary.

However, in this case, the parties contested the applicability of FMVSS 216, which "establishes strength requirements for the passenger compartment roof." 49 C.F.R. § 571.216. The district court found FMVSS 216 applied solely to the front pillars on either side of the windshield, known as the A pillars. Because Mr. Compton's injury occurred when the roof support pillars behind the rear doors (the C pillars) and the pillars behind the cargo deck (the D pillars) collapsed, the district court concluded Kan. Stat. Ann. s 60-3304(a) was inapplicable.

We review **de novo** the district court's interpretation of federal regulations. *Dodson v. Zelez*, 917 F.2d 1250, 1255 (10th Cir.1990). We have found few cases applying FMVSS 216 and none interpreting its scope. However, after reviewing the regulation, we are not convinced the district court's interpretation of FMVSS 216 was unreasonable. FMVSS 216's roof crush resistance tests for passenger cars require the application of force to "either side of the forward edge of a vehicle's roof." 49 C.F.R. § 571.216. Moreover, the regulation mandates "[b]oth the left and right front portions of the vehicle's roof structure shall be capable of meeting the requirements." *Id.* In view of FMVSS 216's emphasis on the A pillars, we cannot hold it explicitly applies to C or D pillar crush. Accordingly, because there appears to be no applicable regulation governing rear seat roof crush, we agree Kan. Stat. Ann. § 60-3304(a) has no application on these special facts.

Drawing all reasonable inferences in favor of Mr. Compton, we hold the district court did not err in denying the Rule 50(b) motion. The judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN D. COMPTON, Plaintiff,

v.

SUBARU OF AMERICA, INC. and
FUJI HEAVY INDUSTRIES, LTD., Defendants.

CIVIL ACTION
NO. 90-1088-MLB

MEMORANDUM AND ORDER

Before the court are the following:

(1) Defendants' renewed motion JNOV and supporting memorandum;

(2) Plaintiff's response; and

(3) Defendants' reply.

The general standards applicable to motions JNOV under Federal Rule of Civil Procedure 50(b) are accurately stated in plaintiff's response (Doc. 135, pp. 6-8) and are not disputed by defendant. In *Marsh v. Coleman Co., Inc.*, 806 F. Supp. 1505, 1507 (D. Kan. 1992), this court summarized the standards as follows:

> Rule 50 of the Federal Rules of Civil Procedure provides that the court may enter judgment as a matter of law against a party who has been fully heard on a dispositive issue if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, ..." The court must determine whether there is evidence from which a jury could find in favor of the party who has obtained a favorable verdict, and may grant the motion only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position. The court may not weigh the evidence or make credibility determinations, but must view the evidence most

> favorably to the non-moving party, giving that party the benefit of all reasonable inferences.

(citations omitted).

Defendants contend, as they did at trial, that the testimony of plaintiff's expert Larry Bihlmeyer was legally insufficient and should have been excluded. Bihlmeyer was plaintiff's only "design expert" and his opinions were essential to plaintiff's theory that the defective design of roof and supporting structures of the Subaru were the cause of plaintiff's injuries and damages. Defendants place great, although not exclusive, reliance upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S., ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Basically, defendants contend that Bihlmeyer's testimony cannot satisfy the various factors set out in part II-C of *Daubert* for the admission of expert testimony under Federal Rule of Evidence 702.

Plaintiff responds, in essence, that Bihlmeyer's testimony was sufficient for purposes of Rule 50(b) on some, if not all, of plaintiff's defect claims (Doc. 135, p. 22). Plaintiff contends that defendants' motion really challenges just Bihlmeyer's credibility and the weight of his opinions, neither of which can serve as a basis for a JNOV.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert*, the Supreme Court breaks Rule 702 into a two-part inquiry: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 113 S. Ct. at 2796. The Court indicates that the first part — "scientific knowledge" — "establishes a standard of evidentiary reliability," *id.* at 2795, and the second part — "assist the trier of fact to understand or determine a fact in issue" — "goes primarily to relevance," *id.* The Court emphasizes that:

> The inquiry envisioned by Rule 702 is ... a flexible one. Its overarching subject is the scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Id. at 2797.

In the present case, defendants do not challenge the relevance of the testimony offered by Mr. Bihlmeyer. Indeed, it is quite clear that expert testimony regarding the design of the Subaru's roof structure would assist the jury in understanding a fact in issue, i.e., whether or not the roof was defectively designed. Defendants focus instead on the term "scientific knowledge" and on the concept of evidentiary reliability. Defendants appear to contend that because Bihlmeyer's opinions did not meet *Daubert's* definition of "scientific knowledge," they should have been excluded as unreliable.

The Supreme Court does state that ". . . the subject of an expert's testimony must be 'scientific . . . knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* at 2795. It is noteworthy that the discussion in at least part II-B (and perhaps the entire opinion) is limited to "scientific" knowledge. In footnote 8, the Court notes: "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here."[1]

---

[1] The difference, if any, between "scientific" and "technical" or other specialized knowledge and the way it is to be handled by district judges trying to apply *Daubert* to particular cases is raised, but unfortunately not answered, by Chief Justice Rehnquist in his dissenting opinion.

> . . . In Part II-B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante,* at 9. Federal Rule of Evidence 402 provides, as the Court points out, that "[e]vidence which is not relevant is not admissible." But there is no similar reference in the Rule to "reliability," The Court

constructs its argument by parsing the language "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . an expert . . . may testify thereto . . . ." Fed. Rule Evid. 702. It stresses that the subject of the expert's testimony must be "scientific . . . knowledge," and points out that "scientific" "implies a grounding in the methods and procedures of science," and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." *Ante,* at 9. From this it concludes that "scientific knowledge" must be "derived by the scientific method." *Ante,* at 10. Proposed testimony, we are told, must be supported by "appropriate validation." *Ante*, at 10. Indeed, in footnote 9, the Court decides that "[i]n a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." *Ante*, at 10, n. 9 (emphasis in original).

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of "technical or other specialized knowledge" — the other types of expert knowledge to which Rule 702 applies — or are the "general observations" limited only to "scientific knowledge?" What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge" be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 2796. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 2796. Following this sentence are three quotations from treatises, which speak not only of empirical testing, but one of which states that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability," *ante*, pp. 2796-97.

Viewed most favorably to plaintiff, Bihlmeyer did not offer any "scientific" opinions. His opinions did not concern a complicated, experimental or esoteric topic at the cutting edge of science. Instead, Bihlmeyer's design defect opinions were of the "technical, or other specialized knowledge" variety; that is, they purportedly were engineering opinions derived from his training as an engineer and his experience working in the automotive industry and as an automotive "consulting engineer" (in this setting, the time-worm euphemism for a professional witness). Thus, it is not appropriate to apply *Daubert's* analysis of the term "scientific knowledge" to this case.[2]

> I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its " falsifiability," and I suspect some of them will be, too.
>
> I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

[2] One district court has declined to categorize proffered automotive design defect testimony as "scientific":

> The application of *Daubert* to the testimony in the present action, however, would require an expansion of the Supreme Court's language beyond its obvious scope and meaning. *Daubert's* narrow focus is on the admissibility of "novel scientific evidence" under Fed. R. Evid. 702. *See Daubert*, ___ U.S. ___, 113 S. Ct. 2786. *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge. *See id.*

Lappe v. American Honda Motor Co., Inc., 857 F. Supp. 222, 228 (N.D.N.Y. 1994).

The concept of reliability is discussed in part II-C of the opinion.[3] Four factors are set out: (1) whether the reasoning or methodology underlying the testimony can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its potential rate of error; and (4) whether it has been generally accepted or rejected in a relevant scientific discipline.

Three of these factors have no logical application to Bihlmeyer's opinions. Factors such as rate of error, peer review and acceptance in a "relevant scientific discipline" have little, if any, bearing on mundane, "professional witness" engineering testimony such as Bihlmeyer's. However, the testing factor arguably has some application in connection with the court's flexible inquiry into the principles and methodology underlying the opinion.

The court has reread Bihlmeyer's testimony. Bihlmeyer identified "basic engineering principles" which supported his opinions: structural analysis, structural engineering, structural mechanics, strength of materials, static versus dynamic loads, engineering analysis, and reliability and failure analysis. (Tr. pp. 17-34, 82-83). The methodology which Bihlmeyer claimed to have used to develop his opinions included inspection of the accident and exemplar cars, taking of measurements and photos, preparation of sketches, performance of a "design engineering review and analysis," review of depositions, and research and review of technical papers and vehicle specifications. (Tr. pp. 112-123). Bihlmeyer did not test the roof crush "standard" which he contended would have prevented plaintiff's injury.

The court has given considerable thought to defendants' argument that Bihlmeyer's testimony should be excluded because he did not do any testing. The problem with defendants' argument is that it focuses on Bihlmeyer's conclusions rather than on the methodology he used to reach them. The court is constrained by the Supreme Court's admonition that its focus must be solely on principles and methodology, *not on the conclusions that they*

---

[3] As before, the Court will assume that *Daubert's* discussion of reliability is applicable where the witness's testimony is of the "technical or other specialized knowledge" variety.

generate. This distinction is made clear in *Conde v. Velsicol Chemical Corporation*, 24 F.3d 809, 813 (6th Cir. 1994): "The holding in *Daubert* . . . deal[s] only with the circumstances under which expert testimony is admissible, and not with the separate question of when such testimony is sufficient to submit a case to the jury." The court simply cannot find that a failure to test, standing alone, is fatal to the methodology which Bihlmeyer claimed to have used in developing his opinion. For example, there was no testimony that testing is an essential element in the methodology of development of engineering opinions such as those given by Bihlmeyer.[4] In the end, Bihlmeyer's failure to test goes to the reliability of his conclusions, not to his methods.

Therefore, the court concludes that to the extent *Daubert* is applicable to Bihlmeyer's opinions, the *Daubert* requirements are satisfied.

The court has been unable to find a Tenth Circuit decision which thoroughly analyzes *Daubert*. However, applicable pre-*Daubert* decisions of the Tenth Circuit are not in conflict with *Daubert*. The "touchstone" of admissibility of expert testimony is helpfulness to the jury. *Werth v. Makita Electric Works, Ltd.*, 950 F.2d 643, 648 (10th Cir. 1991). The subject matter of Bihlmeyer's testimony — automotive design — was facially helpful and relevant. By Tenth Circuit standards, Bihlmeyer possessed the basic qualifications to give such testimony. The fact that Bihlmeyer never designed a car roof and supporting structures was not disqualifying, *Wheeler v. John Deere Company*, 935 F.2d 1090, 1100 (10th Cir. 1991), nor was his failure to conduct tests, *Werth*, *supra* at 650. Although there are Tenth Circuit decisions which say that district courts have broad discretion in determining the competency of expert witnesses, *e.g.*, *Wheeler*, *supra* at 1100, it is pretty clear that a district court in this circuit runs a substantial risk of reversal if it prohibits or restricts the testimony of an apparently

---

[4] One court, applying *Daubert*, has held that an expert's failure to test an alternative design rendered his opinion inadmissible. *Stanczyk v. Black and Decker, Inc.*, 836 F. Supp. 565 (N.D. Ill. 1993). While the ruling has certain practical appeal, it remains to be seen whether it will be widely followed.

qualified expert on a relevant issue. *See Graham v. Wyeth Laboratories*, 906 F.2d 1399, 1408 (10th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990).

These conclusions return the court to the standards for JNOV. Rereading Bihlmeyer's testimony has done nothing to change the court's *extremely low* opinion of Bihlmeyer's credibility and of the validity of his opinions.[5] However, the court's initial decision under Fed. R. Evid. 104(a) as to whether Bihlmeyer would be allowed to testify had to be made, and was made, albeit reluctantly, on Bihlmeyer's qualifications and the subject matter of his testimony. (Tr. pp. 197-198). It would have been improper for the court to decide that issue according to its own view. *Kingsley Associates, Inc. v. Del Met, Inc.*, 918 F.2d 1277, 1286 (6th Cir. 1986). This court's analysis of *Daubert* and the ultimate issue of whether Bihlmeyer's opinions were sufficient to justify the jury's verdict certainly deserve a thorough review by the Court of Appeals. However, this court is bound by Rule 50 and its own rulings which prohibit it from weighing evidence and making credibility determinations. This rule seems to have particular application when the evidence in question involves expert opinion. *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1155 (10th Cir. 1990). The court simply cannot find, viewing all the evidence most favorably to plaintiff and affording plaintiff the benefit of all reasonable inferences, that there is no legally sufficient basis for a reasonable jury to have found for plaintiff.

Accordingly, defendants' JNOV motion (Doc. 131) is denied.

IT IS SO ORDERED.

Dated this 15th day of November, 1994, at Wichita, Kansas.

/s/MONTI L. BELOT
MONTI L. BELOT
United States District Judge

---

[5] For example, Bihlmeyer's design criterion, which would limit roof crush to no more than 2½ inches under average forces of 48,000 to 71,000 pounds, seems more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN D. COMPTON, Plaintiff,

v.

SUBARU OF AMERICA, INC. and
FUJI HEAVY INDUSTRIES, LTD., Defendants.

CV-N-90-1088-MLB

TRIAL TRANSCRIPT

* * *

[Tr. 613]

THE COURT: Well I'm going to talk to the lawyers for a minute, Ladies and Gentlemen. You may as well relax in your jury room while I do this. So remember and heed the admonition and as soon as I'm ready I'll have somebody come and get you.

(Jury leaves the courtroom.)

[Tr. 614]

THE COURT: Let's take about five minutes then I'll allow you to make any short argument that you want to make and I'll make my ruling.

(Recess.)

(Jury is not present.)

THE COURT: Now the jury is in the jury room and I will hear from Counsel briefly on this limited issue of Mr. Bihlmeyer's qualifications to testify.

MR. HITE: Your Honor, I can be very brief. We're talking in this case about a 1982 Subaru. The design of the roof was certainly well before that, although we do not have the exact time established. Mr. Bihlmeyer came in Court and offered his Ford Motor Company experience as primary evidence on his expertise

on the design of roof structures of vehicles. When we get into that in any detail it turns out that his experience is practically nonexistent. He was never in the roof structures design department and the light truck engineering department was never in the automobile or station wagon engineering department. The best that he can say is at one time while he was also consumed by many other duties he was a liaison between those that design and those that manufacture or who would be responsible for the manufacture. He has acknowledged that he has never selected the parts or materials or determined the strength integrity, compressibility or rigidity or otherwise of the roof

[Tr. 615]

structure of any vehicle.

We believe that his experience in consulting years much later where he apparently has formed some personal judgments about designs comes too late and that it constitutes, a — does constitute a personal judgment with none of the safeguards required by the Daubert case.

For all of those reasons we object to testimony of Mr. Bihlmeyer as an expert on the design of roofs or roof support structures of automobiles.

Our objection on the welding aspects is even briefer. He's acknowledged that he's not a metallurgist. He is not an expert on materials. He has acknowledged that he has testified in another case that his expertise in this area is in kind of a gray area; and so far as pertinent here, he says that he has two primary qualifications, one being the involvement in, but not writing of some spot weld specifications; and the other in writing the specifications for arc welding which is not the type of welding we're doing here. For those reasons we also object to his expertise as a welding expert.

MR. JOHNSON: Your Honor, we're dealing here with basic mechanical engineering principles and specifically dynamic mechanical engineering principles as relates to a product's response to dynamic forces that may be expected to be imposed upon the product. Specifically, Mr. Bihlmeyer

[Tr. 616]

has a master's degree in mechanical engineering; he has many years experience in automotive engineering; and he specifically has experience as a design engineer. There can be no question but what he is by education, experience and training a mechanical engineer, a design engineer and an automotive engineer. Specifically he is an automotive engineer as relates to the relationship of dynamic forces on a product or part of a product, or for that matter the entire vehicle. He has designed wheels and welds and weld locations for wheels and the strength of wheels that obviously undergo significant dynamic forces during the ordinary use of a vehicle. He has been involved in the design of roof — I'm sorry, of fuel systems. Fuel systems which must be designed in a way to avoid intrusion into the area of the systems in order to avoid serious injury or death from piercing into the roof — I mean piercing into the fuel system and causing spillage of fuel, thus relating to crashworthiness.

Specifically, when he advanced in Ford Motor Company to a point where he was involved with this group of designers who were changing the Ranger to a Ranger super cab he had specific responsibility of overseeing the change of that design from the Ranger to the Ranger roof cab. Point of the matter is that as a mechanical design engineer with extensive experience in designing products that have to withstand dynamic loads, he is certainly qualified to testify

[Tr. 617]

about a roof and roof support members because we're obviously talking about dynamic loads that are applied.

The Tenth Circuit is very clear about qualification of experts. In the case of Wheeler vs. John Deere it was stated emphatically that in a products liability action an expert witness is not strictly confined to his area of practice, but may testify concerning related applications. A lack of specialization does not affect admissibility of the opinion, but only its weight. It goes on to talk about a number of different cases where engineers, mechanical engineers, had absolutely no experience with regard to the specific product and they were allowed to testify and it is clear that they were qualified to testify. And the only thing that the lack of experience goes to is the weight. Here we have a man who is experienced.

Of course he has not designed from top to bottom a roof and roof support structure. But he's an automotive engineer with tremendous background and knowledge of automobiles and their systems and their parts. And he does have specific background and training and experience with regard to roof and roof design as relates to that Ranger pickup going to the super cab. So under the law that I — as I can see it, this man is not only qualified, but very well qualified. Daubert doesn't enter into this because that relates to, you know, really doing away with the old Fry test which is, you know, the scientific

[Tr. 618]

studies and technology, and he's not done any of those types of tests or anything so I don't think that really is involved.

With regard to the welding, I think there's been ample testimony that welding is a part of the design criteria to insure the strength of a particular product to avoid intrusion from dynamic forces. He's not a welder and he's not a metallurgist and we're not offering him for that purpose. We're offering him for the purpose of talking about what is appropriate in terms of location of welds and types of welds to insure structural integrity. And, by the way, I don't think there's anything any place that I've ever heard of that says that a mechanical engineer has to have been doing mechanical engineering on a particular product at the time it was designed in order to testify. I know in medical malpractice cases I think the doctor has to be in clinical practice at the time of the incident, but I don't think that applies at all here in this case.

THE COURT: Well, I think you're basically right, Mr. Johnson. I don't think the Daubert case has a lot to do with the problem that I'm faced with. The Supreme Court says: Faced with a proffer of expert scientific testimony the trial judge must determine at the outset pursuant to Rule 104(a), whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to

[Tr. 619]

understand or determine a fact in issue. Then it goes on to say: This entails a preliminary assessment of whether the reasoning and methodology underlying the testimony is scientifically valid. I don't think we're dealing with that here. Really. But to the extent

that you might say that we are, clearly there's some scientific knowledge involved in the testimony of Mr. Bihlmeyer and it seems to me that, while I have to say for the record I still don't exactly know what his testimony is going to be about design and manufacturing defects, I'm assuming that it will — is being offered and will assist the jurors to understand whether or not there is a design or manufacturing defect involved in this case. So to the extent the Daubert case is applicable, it's applicable.

And I think you're right, I think when you get right down to it, Wheeler vs. John Deere is the case that I've got to follow here. Wheeler was decided in 1991 but I think it's still good law. It not only is from the Tenth Circuit, but it comes right out of this court, not this judge but this court, and I think the Tenth Circuit in this case announces or, rather, reaffirms its position of extreme liberality with respect to admissibility of expert testimony in products liability cases. I don't think there's any requirement that I know of, none has been cited to me, that in a products liability case an engineer has to be involved

[Tr. 620]

in or studying the particular type of engineering, has studied the particular type of product or engineering that he or she is prepared to testify about. There's no greater example than the man that we're all familiar with and that is George Green. At least I'm familiar with him and Mr. Johnson is familiar with him. I expect Mr. Hite is, too. He testified in every court in the United States and nobody's ever succeeded, to my knowledge, in keeping him from testifying. He's a mechanical engineer that knows about every mechanical device known to man. Whether juries believe him or not is another matter. But I think that's the rule.

Frankly, I'm not here to judge the weight or credibility of this man's testimony. If I was, he wouldn't be testifying in this case because as far as I'm concerned as the judge — I will not communicate this to the jury — but as far as I'm concerned, he has little if any knowledge about what he is purporting to testify about. I think that his qualifications — you make it sound like this man is the biggest welding expert in the United States because he had something to do with wheels on Ford cars. Well that doesn't have anything to do with this case. And I listened carefully. He doesn't

know beans about welding in my opinion and he knows very little about roofs in my opinion. He didn't have hardly anything to do with the changeover of a roof from the regular cab of this pickup truck to the super

[Tr. 621]

cab; but I'm not here to judge credibility. In my opinion, they can find somebody that would be a lot better expert. Probably the best expert for this type of situation would be somebody with a 6th grade education who had built sprint cars for 25 years and seem 'em roll over every Saturday night for 25 years and improved on the roof structure. But, as I say, this is the dilemma that every district judge faces in these types of cases where you have what the judge feels is a marginal expert, really doesn't know much about what he's here to talk about, but the judge doesn't make that decision because that's the credibility of the expert. His qualifications under the Tenth Circuit standard apparently are enough. They're so liberal in their rulings that his qualifications are enough to allow him to testify. So I'm going to allow him to testify about the design and manufacturing defects that he apparently found in this automobile.

But, now I'm looking now at the Defendant's supplemental trial brief, on Page 5, suggests that this witness also wants to talk about — Page 6, rather, the inadequacy — his opinion as to the inadequacy of FMVSS 216. And I don't know whether he's getting into — I don't know what his testimony is about that. I've heard nothing along those lines; but I have heard nothing to indicate that this man is qualified in any manner to give any opinions as to

[Tr. 622]

whether or not that standard is adequate or inadequate; nor have I heard anything to suggest that this man is qualified to give any testimony regarding the existence of industry standards apart from FMVSS 216 which is a government standard. So if there's a plan here to allow him to testify about industry standards or deviation from industry standards, I will not allow him to testify about that. I don't know where we're coming from on that but I remember a discussion that we had in chambers I think and something about industry standards and I haven't heard anything in what I've heard

today that indicates he knows anything about industry standards for design of a roof or anything like that.

MR. JOHNSON: Well, Your Honor, I might say two things: First of all, I would very respectfully say that I do not believe that the statements you just made about this man's qualifications is probative or appropriate.

THE COURT: Why not?

MR. JOHNSON: I can assure —

THE COURT: It's entirely appropriate. In the context that we are right now because this is exactly what happens in these cases, Mr. Johnson, and you know it. A judge, a trial judge allows a witness with the marginal qualifications and knowledge that this man has to testify in a case and then either the Plaintiff or the Defendant,

[Tr. 623]

depending on who's calling him says to the jury, well, you were allowed to testify as an expert in such and such a case and such and such a case, makes it sound like the man has the official stamp of approval of the judge. He does not have my stamp of approval. The only thing I'm talking about here is I'm following what I perceive to be the law from the Tenth Circuit about his testimony but I certainly, as the judge, am not going to, by allowing him to talk to the jury, put the stamp of approval on what I perceive to be his expertise because I perceive it to be little or none in this area. But that's on the basis of credibility and I'm not the judge of credibility here.

MR. JOHNSON: Your Honor if I just — I'm constrained to say something and that —

THE COURT: I want you to say what you want to say. You know I'll let you.

MR. JOHNSON: That is that in my opinion — and I'm not the Court — in my opinion a mechanical engineer or a structural engineer from Kansas State University or Texas A & M would be imminently qualified to talk about the design of a roof. All a roof is is a mechanism by which to support and protect the people

inside. It has nothing unusual about it in terms of dynamic intrusion. It has nothing unusual about it in terms of static testing. These are commonplace and ordinary and oft repeated basic engineering principles and I

[Tr. 624]

would greatly disagree that this man with a master's degree in mechanical engineering and with the experience that he's had is not qualified in your opinion to testify about a structure. I mean, it's like we're saying automobile roofs are some esoteric thing that only someone who has worked for, you know, do you want five years, ten years, 15 years, in designing a roof. I mean, a roof is not a unique product. I'm not arguing with the Court but I just — I feel constrained to say these things because, frankly, I'm taken aback and am nonplused by the comments of the Court.

Secondly, with regard to what he —

THE COURT: But you won. I'm going to allow him to testify and the jury is not going to hear my opinions regarding him at all.

MR. JOHNSON: I understand.

THE COURT: You can make your argument at the end of the case that he's the greatest engineer that ever came down the pike, Mr. Johnson. And I won't interfere with it. I won't — I can comment on the evidence, but I won't. Okay.

MR. JOHNSON: The only other thing in my mind, it is a direct implication about me also, Your Honor.

THE COURT: No. You know very — you and I have known each other for 25 years and you know that there's no implication about you at all here.

MR. JOHNSON: But I'm the one putting this

[Tr. 625]

witness —

THE COURT: Let's just put that aside.

MR. JOHNSON: I'm the one putting this witness in front of the jury. And I can tell you that I wouldn't be putting him here unless I personally felt that this man was qualified.

THE COURT: If I thought it was anything else I would say something about it, but it doesn't have anything to do with you at all. And there's nothing — please draw nothing from that. You ought to know based on what I said to the jury about you and Mr. Hite, as well as as long as we've known each other, that I have the absolute highest regard for you and for Mr. Hite. So let's go on beyond that. Okay.

MR. JOHNSON: Now, with regard to the design defects he's going to talk about. I'm a little confused as to exactly what you're saying because perhaps it might be appropriate for, you know, before we start blundering into this, for you to take a look at one of the exhibits which has, you know, his opinions and conclusions on it because I don't want to be in a position where I'm up asking about these various opinions and in design defects —

THE COURT: Well, I don't know. The problem is, you see, I don't know what his opinions and conclusions are except in a very broad context; but I have some very severe reservations about allowing him to come in here, as

[Tr. 626]

apparently he's going to do, and say that he disagrees with the federal safety standard and would do something else. Now, if that's what he's going to talk about, I have some real doubts about that.

MR. JOHNSON: He's going to talk about Federal Motor Vehicle Safety Standard 216.

THE COURT: All right.

MR. JOHNSON: And I think you will see that he is somewhat knowledgeable about it.

THE COURT: That's — I have no problem with that. If he can — he can talk about that all he wants.

MR. JOHNSON: And that that standard is a standard that should be met but it's not the only thing that should be met when an engineer is designing a vehicle.

THE COURT: All right.

MR. JOHNSON: And that's —

THE COURT: Well I know you've got a negligent design claim here and I'll listen to what he has to say but — well let me just leave it at that — I'll listen to what he has to say.

MR. JOHNSON: The FMVSS 216 doesn't even apply to the C and D pillar anyway. It applies to the A pillar.

THE COURT: Then why are we talking about it so much?

MR. JOHNSON: Because they did a 216 test on the C

[Tr. 627]

and D pillar and I think that's what I need to talk with him about is, you know, what's it designed for and knows about that, it's designed for the A pillar. There's no question about that. They did it on the C and D pillar. So we're going to talk about it. But it's not a bar to recovery here based on the Kansas product liability. It doesn't apply to the C and D pillar.

THE COURT: I recognize, I think, what the law is about that particular standard.

MR. JOHNSON: I've said my peace.

THE COURT: All right. Let's get the jury — do you have anything to say, Mr. Hite?

MR. HITE: No, sir.

THE COURT: You guys know what's coming down the pike here. I don't. So if you've got anything else to say to me, let me know. All right. Let's get the jurors.

(Jury enters the courtroom.)

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN D. COMPTON,

Plaintiff-Appellee

v.

SUBARU OF AMERICA, INC.;
FUJI HEAVY INDUSTRIES,
INC.,

No. 94-3429
(D.C. No. 90-CV-1088)

Defendants-Appellants.

PRODUCT LIABILITY ADVISORY
COUNCIL, INC.,

Amicus Curiae.

ORDER
ENTERED July 25, 1996

Before PORFILIO, McWILLIAMS, and ALARCON,* Circuit Judges.

---

*The Honorable Arthur L. Alarcon, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the

court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By_____
Deputy Clerk